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In the Supreme Court of the United States

No. [redacted] 52

HARRY A. HAHN,

Petitioner,

v.

ROSS ISLAND SAND & GRAVEL CO.,
a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The sole question presented in this Court, and the Oregon Supreme Court, is whether the petitioner is barred from maintaining a damage action on the grounds that the sole and exclusive liability of the respondent to the petitioner is that liability provided for under the Longshoremen & Harbor Workers' Compensation Act (33 USCA Secs. 901-950).

STATEMENT OF THE CASE

In the Supreme Court of Oregon, the petitioner argued that the waters upon which the petitioner was injured were not "navigable waters of the United States"

within the meaning of the Longshoremen & Harbor Workers' Act (33 USCA Sec. 903). Petitioner does not make that direct argument in his petition; however, petitioner in his "Facts Material to the Question Presented" (Petition, pp. 5-6) makes erroneous statements of fact or states misleading conclusions, all dealing with the use of the lagoon and supposedly bearing on the question of navigability. The Supreme Court of Oregon stated:

> "It is contended first, on the part of the plaintiff, that the injury did not occur upon 'navigable waters of the United States', *but as to this we think that there can be little doubt.*" (Petition pp. 29-30) (Emphasis supplied)

ARGUMENT

I.

This action does not involve special and important considerations and arises only because of unique Oregon statutes.

Petitioner seeks to attach great importance to this action by contending that it will result in many employees being required to accept compensation benefits rather than the net proceeds of state damage actions.

Various members of this Court have stated that such a result is commendable rather than censorable. For example, the concurring opinion in *Wilkerson vs. McCarthy,* 336 U.S. 53, 69 S. Ct. 413, 419, stated:

> "This cruel and wasteful mode of dealing with industrial injuries (negligence damage actions) has long been displaced in industry generally by the insurance principal that underlies workmen's compensation laws."

Petitioner pleads that the decision of the Oregon Court places many thousands of "uncovered persons" in the serious predicament of going for years without any "redress, damages, or compensation" (Petition p. 11).

It is respectfully submitted that this plea is a patent attempt to mislead the Court. Petitioner's position really is that petitioner chose initially not to accept the benefits payable under the Longshoremen & Harbor Workers' Compensation Act. Rather, the petitioner decided to attempt to exchange immediate monthly compensation payments for the chance of a later, larger lump sum jury verdict. Petitioner, by this petition, is asking this Court to make his attempt at this exchange pay off. When petitioner fails, petitioner will immediately receive the three years' benefits he was initially entitled to under the Longshoremen & Harbor Workers' Compensation Act and then he will receive the current benefits to which he is entitled. Petitioner has one year from the final determination of this litigation to file a claim for benefits under the Longshoremen & Harbor Workers' Act (Longshoremen & Harbor Workers' Act, Section 913(a)(d)).

This Court is usually requested to grant life or freedom. This petitioner is requesting that he be granted a doubtful financial advantage; an advantage denied most of his fellow injured employees and one which can possibly be gained only because of the peculiarities of Oregon law.

The Oregon compensation laws are certainly peculiar,

if not completely unique. A State Industrial Accident Fund exists for the payment of compensation benefits. Employers electing to contribute to this State Fund are rewarded by being rendered immune from damage actions by injured employees. Employers not electing to contribute to the State Fund, but rather carrying private insurance coverage to pay workmen's compensation benefits or by being self-insured, are dissuaded from such a practice by being not immunized from damage actions by injured employees. The statute does not require employers electing not to contribute to the State Fund to carry workmen's compensation insurance coverage or to be self-insured. However, the long acceptance of the workmen's compensation principle, the force of organized labor, and the economics of the matter, have resulted in all Oregon employers of hazardous occupations carrying either state, private or self-insured coverage for workmen's compensation benefits. The petitioner was not an "uncovered" employee, nor are others in hazardous occupations "uncovered" employees in Oregon.

Actually, the petitioner here had three initial choices of possible remedies. He could have received compensation payable under the Longshoremen & Harbor Workers' Compensation Act; this he chose to temporarily reject. He could have claimed compensation benefits according to the schedule set by Oregon law from respondent's private insurance carrier (these benefits for most cases are less than those payable under the Federal act, just as are benefits payable from the State Fund). Of course, it is not known what response the in-

surance carrier would have made to such request. Petitioner instead chose the third method, a damage action, available to petitioner only because this respondent elected not to contribute to the State Industrial Accident Fund, but rather to carry private insurance coverage for workmen's compensation benefits.

This case, as well as all others in this general field, is an extremely interesting exercise in legal gymnastics. The parties, of course, consider it exceedingly important to them. This case, however, does not involve the solution of any important industrial or legal problem.

II.

The decision of the Oregon Supreme Court is not in error.

The opinion of the Oregon Supreme Court was based upon two premises; if the physical facts of the case placed the case in the "twilight zone," the "twilight zone" concept was not intended to apply here where the alternatives were a damage action on one hand and compensation under the Longshoremen & Harbor Workers' Act on the other. The second proposition of the Oregon Supreme Court was that the case was not within the twilight zone, but was "a case to which the Longshoremen & Harbor Workers' Act clearly applies" (Petition p. 46).

The Oregon Court did not believe that this Court intended to extend *Davis vs. Department of Labor & Industries*, 317 U.S. 249, 63 S. Ct. 225, to grant a preference to an employee of one remedy over another. *Parker vs. Motor Boat Sales*, 314 U.S. 244, 62 S. Ct. 221, and

Davis vs. Department of Labor, supra, granted an injured employee or the representative of a deceased employee a remedy and a remedy for which the employer had coverage. A contrary decision would have either denied the remedy, as a matter of finances, or would have subjected the employer to a financial responsibility he had not foreseen. In *Davis,* it could have subjected him to fine or imprisonment.

In the latest known work on this subject, the authors, *Gilmore and Black,* in *The Law of Admiralty,* page 357, state, after tracing the history of cases in this twilight area:

> "The Court has not yet articulated its reason for refusing to extend the twilight zone to cover workers whose choice of remedy is between a compensation proceeding and an action under FELA, the Jones Act or maritime law. Nevertheless, there is a substantial reason for the refusal. Where the choice of remedy is between two compensation acts, the employer's liability is not seriously affected by the rule that allows claims to be brought indifferently on either side: he is liable without fault in either case but only for the administratively determined award. Where, however, the choice is between a compensation proceeding and a court action with right of trial by jury there is a vast difference in what the employer may be ultimately held liable for. Twilight zone theory where the choice is between two compensation acts protects the class of workers without prejudicing their employers. The same theory, where the choice is between compensation and a jury trial, would protect other classes of workers, but at a substantial cost to employers. That far the court has not been willing to go."

If this case is held to be in the "twilight zone," it is difficult to conceive of any set of facts which will not be in the "twilight zone." A holding that this set of facts falls within the twilight zone will mean that no employee of an Oregon employer carrying private coverage or self-insured will initially accept benefits under the Longshoremen & Harbor Workers' Act. The pressure will certainly be present to first try his luck at a damage action and only if he fails in this will he accept Longshoremen & Harbor Workers' compensation benefits.

The petitioner's work was always on navigable water. True, the former "maritime-but-local" doctrine caused the Oregon Supreme Court to hold that a plaintiff who was working on a dredge in the river scooping up sand was confined to the state compensation law for his remedy. *Mark vs. Portland Gravel Co.,* 130 Ore. 11, 278 Pac. 986 (1929). On the other hand, during this same "maritime-but-local" time, the Oregon Supreme Court held that assisting in the loading of a vessel, as the petitioner was doing in this case, was maritime and not a matter of purely local concern. *Martinson vs. State Industrial Accident Commission,* 154 Ore. 423, 60 P.2d 972 (1936). The respondent was certainly an employer that "has any employees engaged in maritime service" (Sec. 902(4)). This fact was thought to be important by this Court in *Penn R. R. Co. vs. O'Rourke*, 34 U.S. 334, 73 S. Ct. 302. This employee, the petitioner, and this employer, the respondent, had a constant and direct relation with interstate commerce on navigable water.

This action was brought under a statute known as the Oregon Employers' Liability Act, Oregon Revised Statute 654.305, et seq. This law places a substantially higher standard of responsibility on the employer, and in other substantial ways changes the usual duties owed by the employer and employee. This Court has held that a damage action for injuries incurred on navigable waters is governed by Federal maritime law. *Pope & Talbot vs. Hawn,* 346 U.S. 406, 74 S. Ct. 202. A reversal of the Oregon Supreme Court decision would necessarily involve the application of the Oregon employers' liability law to a maritime tort. This would destroy any semblance of uniformity in maritime law. One of the Federal judges in the District of Oregon wrote:

> "In my view, the application of the Oregon Employers' Liability Act with the higher standards required of it in connection with the use of machinery and equipment would destroy the uniformity of the maritime law and is, therefore, not applicable to a situation in which a workman is killed on navigable waters within the territorial limits of Oregon." *Sanderson vs. Sause,* 114 Fed. Supp. 849, 852 (1953).

CONCLUSION

Petitioner's contention that this decision involves an important legal principle affecting many persons is without substance. Petitioner has sought a remedy thought to be more advantageous than that normally available to an injured employee and a remedy that is only possibly available by reason of the peculiarity of the Oregon Workmen's Compensation Act. The Long-

shoremen & Harbor Workers' Act provides an adequate and petitioner's sole remedy.

Petition for a writ of certiorari to the Supreme Court of the State of Oregon should be denied.

Respectfully submitted,

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